

ANALYSIS OF HB 2171

House Agriculture & Ecology Committee
25, 1999

February

Establishes processes for monitoring and improving water quality.

BACKGROUND:

Section 303(d) of the federal Clean Water Act requires states to identify those waters that do not meet water quality standards, after taking into account technology-based reductions of pollutant discharge. The list of such waters is known as the 303(d)– list. For waters identified on the 303(d) list, the state must establish total maximum daily loads (TMDLs) that will ensure attainment of water quality standards. A TMDL is a quantitative analysis that defines the maximum amount of a pollutant that can be discharged into a water body from all combined sources.

A number of citizen suits were brought against EPA beginning in the mid-1980s alleging that EPA was not requiring the development of 303(d) lists, or that such lists were inadequate. In Washington, lists have been developed every two years, as required, since at least 1988. A citizen suit was brought against EPA in Washington in 1991, as well as in other northwest states, alleging the state’s 303(d) lists were inadequate. In January of 1998, the Washington case was settled through negotiations between EPA, Ecology, and the plaintiff. The settlement that was agreed to calls for Ecology to develop over 1500 TMDLs on 666 water segments identified on the 1996 list in a 15-year period. A TMDL is required for each exceedence of a water quality standard, and there may be multiple exceedences in the same location.

The Department of Ecology currently lists water segments based on a variety of data, and then removes segments from the list if further testing shows the segments actually meet standards. Different public and private entities conduct water quality monitoring. Not every entity uses approved quality assurance and quality control plans in conducting such monitoring.

The EPA convened a federal advisory committee in 1996 to develop recommendations on how to improve the TMDL program. The committee’s report and recommendations were released in July 1998. The EPA is currently revising its rules regarding development of the 303(d) list and TMDLs, but the basic framework is established by law.

SUMMARY:

The state's policy on water quality improvement is described. Definitions are provided. The department's water quality monitoring program is provided with additional direction. An advisory committee is established to develop data quality objectives and guidelines. This committee includes legislators and is also directed to review the use-based water quality standards that are currently being developed by the department and to compare them to the current classification system.

Processes are established for developing lists of water quality limited segments and for developing TMDLs. The list is developed every four years, or as determined by EPA, and is adopted by the department as a rule. The list may be appealed in superior court, just like any other rule. The effect of listing is that no new sources or discharges may be allowed in a listed water body. In addition, actions must be taken to improve the water quality in each of the listed segments until that segment is removed from the list.

Alternatives to TMDLs, known as other pollution control measures (OPCMs), are authorized for nonpoint sources. If the water segments subject to the OPCMs do not show measurable improvements five years after listing, or five years after the effective date of the act, TMDLs are developed by the department. Where both point and nonpoint sources are the likely causes of exceedences, the department develops TMDLs, but nonpoint sources are to receive aggregate loads. Where point sources only are the likely cause of exceedence, the department develops TMDLs.

TMDLs are comprised of seven elements, including implementation and adaptive management, as recommended by the federal advisory committee. The first five elements require quantification; the last two are more qualitative. TMDLs are developed as near to the site of impairment as possible, and an opportunity for public comment is provided prior to adoption. TMDLs are adopted by the department as orders and may be appealed to the pollution control hearings board only for the purpose of revising one or more elements of an approved TMDL.

The department is directed not to enforce exceedences of water quality standards that are limiting for aquatic or water-dependent species against persons who are subject to binding agreement, intended to help restore the habitat of these species, such as field office technical guides. The immunity is provided for up to 15 years as long as measurable progress toward attainment of standards can be shown at five-year intervals.

TMDLs are required for marine waters on the lists of water quality limited segments if no source control plan has been adopted.

Advisory committees are established to develop recommendations for storm water management and for revisions to the shoreline management act.

Attachment 1 provides a section-by-section summary.

Sec. 1. Intent section.

- Although a lot of progress has been made under the clean water act, too many water bodies still exceed water quality standards;
- It is the policy of the state to ensure the attainment of WQ standards;
- The legislature believes that most water segments should meet water quality standards as soon as possible after listing, and that five-year and ten-year milestones should be established to measure progress toward this goal;
- Water quality standards should be attained through a variety of means;
- The burden for attaining water quality standards should be shared among the various contributors to water quality impairment in proportion to their contribution;
- A watershed approach is encouraged;
- Water quality monitoring should be enhanced.

Sec. 2. Definitions.

New definitions are added:

- Designated use
- Clean water act
- Listing cycle
- Load
- Loading capacity
- Allocation
- Total maximum daily loads
- Other pollution control measures
- Wastewater discharge permits
- Water quality limited segment
- Water quality assessment
- Effluent trading

Sec. 3. Data reliability for decisions to list water bodies as water quality limited segments.

- The list of water quality limited segments that is required to be submitted to the EPA must be based on accurate data that is reflective of current conditions;
- A water segment may be listed as water quality limited only when documentation is provided showing the submitted data have met data quality objectives and other requirements of an approved quality assurance program plan, or the department independently samples the water segment;
- The department is required to coordinate a reliable, state-wide water quality monitoring network across the state that assures a department presence in each WRIA;
- The department is required to coordinate water quality data collection that is aimed at filling the most critical information gaps;
- The department is required to appoint a committee of persons with expertise in collection, analysis, and interpretation of environmental data. In addition, four legislators are

appointed participate in the committee process. The committee is directed to: (1) Develop data quality objectives; that is identify how accurate and how complete data have to be for program purposes; (2) Develop quality assurance and quality control guidelines for freshwater data; and (3) Compare proposed use-based standards with the current classification system in terms of resource protection and regulatory burden;

- The committee is required to provide its recommendations to the legislature, the department, and EPA by December 31, 2000.
- The department is required to based its data quality objectives and its quality assurance and quality control guidelines on the committee's recommendations;
- Water quality data used by, or submitted to, the department must comply with the new guidelines after July 1, 2001;
- The department must receive permission to cross private property if doing so is necessary to collect a sample, and property owners or others may request to split a sample for independent analysis.

Sec. 4. Listing of water quality limited segments.

- After July 1, 2001, the department shall prepare a list that identifies all water segments that do not meet water quality standards;
- The list must be based on data collected in compliance with the department's guidelines;
- Segments stay on the list until water quality standards attained;
- The list is developed every four years, or as determined by EPA;
- The listing process is described, including adoption of the list by rule;
- Listing of water quality segments is not subject to SEPA review.

Sec. 5. SEPA Review.

- The SEPA statute is amended to reflect the exemption from environmental review of listing of water quality limited segments, as well as of TMDL development.

Sec. 6. Effect of Listing.

- A NPDES permit may not be issued to a new source or discharger if the discharge would contribute to an existing violation of water quality standards.

Sec. 7. Total Maximum Daily Loads.

- OPCMs apply when nonpoint sources are the likely cause of exceedences; if monitoring data do not show measurable improvements in five years from listing, or five years from the effective date of this act, whichever is later, a TMDL is required;
- TMDLs apply when both point and nonpoint sources are the likely cause of exceedences, and the department shall develop individual loads for point sources and aggregate loads for the nonpoint sources;
- TMDLs also apply when point sources are the likely cause of exceedences;
- Priorities for TMDL development are established;
- Seven steps are involved in TMDL development;
- The department is required to initiate TMDL development in the town or city closest to the site of the impairment;
- If a consensus among contributors to the impairment is not achievable, the group may retain a mediator, and if that is unsuccessful, the department shall allocate loads;

- an opportunity for public comment is provided prior to TMDL adoption as an order of the department;
- The order may only be implemented through existing regulatory controls and does not create a separately enforceable cause of action;
- The order is published in the Federal Register;
- The order may be appealed to the PCHB only for the purpose of renegotiating an element or elements of the TMDL;
- The department must consider requests to engage in effluent trading, and must develop guidelines for evaluating and approving effluent trades;
- Watershed planning units are authorized to implement OPCMs, develop TMDLs, or request the department to develop TMDLs, for single pollutants that are widespread in a watershed.

Sec. 8. Jurisdiction of the PCHB.

- The PCHB may hear appeals of orders adopting TMDLs.

Sec. 9. Limitations on Enforcement.

- The department may not enforce exceedences of water quality standards identified as limiting for salmonids, other aquatic life, and water-dependent wildlife that is listed as threatened or endangered under the endangered species act (ESA) against persons who are subject to binding agreements such as the use of FOTGs, mitigation requirements under section 7 of the ESA, or habitat conservation plans;
- The immunity under this section lasts no longer than 15 years;
- Water quality criteria for aquatic species are limited to the conventional parameters.

Sec. 10. Marine Waters.

- TMDLs are required in marine waters if no cleanup is planned or no source control plan has been adopted.

Sec. 11. Storm water Advisory Committee.

- The department is required to convene a storm water advisory committee to update the storm water management plan and the Puget Sound storm water management manual;
- A committee shall complete its work by December 31, 2000, and shall provide a progress report by December 31, 1999.

Sec. 12. Shoreline Management Advisory Committee.

- The department is required to convene a shoreline management advisory committee to develop recommendations for updating the Shoreline Management Act.
- A committee shall complete its work by December 31, 2000, and shall provide a progress report by December 31, 1999.